IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0353
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
EFRAIN MERINO GAMEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-37995

Honorable Jack Arnold, Judge Pro Tempore
Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Thomas F. Jacobs — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Efrain Gamez was convicted of possession of marijuana for sale, a class three felony, and sentenced to a presumptive prison term of five

years. On appeal, he argues the trial court erred in conducting his trial *in absentia*, failing to instruct the jury it could find him guilty of the lesser-included offense of possession of marijuana, and admitting into evidence photographs of marijuana he did not possess. For the reasons expressed below, we affirm the conviction and sentence.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against an appellant. *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). In April 1992, Tucson Police Officer Jaime Flores received a tip that led him to an apartment complex where he observed Gamez and another man carrying bags out of the complex. Gamez placed his bag into the trunk of a vehicle and closed the hatch. Flores approached the car, identified himself as a police officer conducting an investigation, and asked Gamez if the bag he had placed in the trunk belonged to him. Gamez said he did not know who it belonged to or what it contained but Flores could "look inside." Flores opened the bag and saw items "wrapped in plastic," later determined to be seven packages of marijuana weighing over nineteen pounds. Gamez indicated the bag had come from Apartment 301 in the complex. A search of that apartment produced fifty more bales of marijuana weighing a little over 120 pounds. Gamez then told Flores he was "putting together" a marijuana transaction for which "he was going to receive $3,000."

¶3 Gamez was charged with possession of marijuana for sale, a class three felony, and a trial date was set for September 9, 1992. After he failed to appear at several pretrial

status conferences, a bench warrant was issued for his arrest and the trial was continued to December. Gamez was thereafter tried *in absentia* and found guilty as charged. He was apprehended in July 2005 and, in October, was sentenced to a presumptive prison term of five years. This appeal followed.

Jury Instruction

¶4 Gamez first contends the trial court erred in failing to instruct the jury that it could find him guilty of the lesser-included offense of possession of marijuana, arguing "[i]t is conceivable that the jury might have rejected the State's evidence that the quantity alone was sufficient to prove possession for sale, and therefore returned a verdict of guilty upon the lesser included offense." The state asserts the court properly refused to give the instruction because Gamez's "own statements established he did not commit the crime of simple possession."

¶5 Generally, a trial court must instruct the jury on "all offenses necessarily included in the offense charged." Ariz. R. Crim. P. 23.3, 17 A.R.S. In determining whether it should instruct a jury on a lesser-included offense, a court must consider (1) whether the offense is in fact a lesser-included offense of the offense charged and (2) whether the evidence supports giving an instruction for the lesser included offense. *State v. Brown*, 204 Ariz. 405, ¶ 7, 64 P.3d 847, 850 (App. 2003).

¶6 As for the first factor, it is well settled that possession of marijuana is a lesser-included offense of possession of marijuana for sale. *State v. Chabolla-Hinojosa*, 192

Ariz. 360, ¶ 15, 965 P.2d 94, 98 (App. 1998); *State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980). Gamez cites *Chabolla-Hinojosa* for the proposition that a jury instructed on possession of marijuana for sale must also be instructed on the lesser-included offense of possession of marijuana. But, in that case, Division One of this court, while noting that possession of marijuana is a lesser-included offense of possession of marijuana for sale, held only that it was error for the trial court to instruct the jury it could find the defendant guilty of both possession of marijuana for sale and transportation of marijuana for sale where the possession was incidental to the transportation. 192 Ariz. 360, ¶¶ 15, 21, 965 P.2d at 354-365. *Chabolla-Hinojosa*, therefore, provides no support for Gamez's argument.[1]

¶7 An instruction on simple possession of marijuana should not be given where evidence shows the possession was incidental to the sale or the marijuana was obtained solely for the purpose of a particular sale. *State v. Ballinger*, 110 Ariz. 422, 425, 520 P.2d 294, 297 (1974); *see also State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985) (where extra element of greater offense that distinguishes it from lesser-included offense not in dispute

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[1]Gamez also relies on *State v. Dugan*, 125 Ariz. 194, 608 P.2d 771 (1980) (where defendant convicted of robbery, trial court erred in failing to instruct jury on lesser-included offense of theft), and *State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001) (holding trial court did not err in instructing jury on both aggravated assault and lesser-included offense of disorderly conduct). But neither case supports his position because, in each one, evidence permitted the jury to reasonably conclude that the appellant had committed only the lesser-included offense. *See Dugan*, 125 Ariz. at 196, 608 P.2d at 773; *Miranda*, 200 Ariz. 67, ¶¶ 6-7, 22 P.3d at 508; *see also State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985) ("[W]here defendant could be guilty of the crime charged (the greater offense) or not at all, an instruction on the lesser offense is not justified.").

or no evidence presented contesting it, defendant not entitled to instruction on lesser-included offense); *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692 (App. 2005) (instruction should not be given unless reasonably and clearly supported by evidence). In either instance, the possession merges into the sale and there is only one offense. *Ballinger*, 110 Ariz. at 425, 520 P.2d at 297.

¶8 The evidence showed Gamez possessed over nineteen pounds of packaged marijuana, which he placed into the trunk of a car and which had come from an apartment that contained over 120 pounds of similar marijuana packages. Gamez admitted the marijuana was part of a sale and he was to have been paid $3,000 for his role in the transaction. Additionally, Flores testified he had been assigned to the Metropolitan Area Narcotics Trafficking Interdiction Squad for over ten years, the marijuana was worth $650 to $750 per pound, and his "opinion would be, based on all the facts, that it was possessed with the intent for sale." That Gamez might have been "merely . . . transporting it to another party" is of no moment. Because the evidence established Gamez's possession was incidental to and for the purpose of a sale, and because Gamez presented no evidence or argument that it was possessed exclusively for personal use, the trial court did not err in refusing to instruct the jury on possession of marijuana. *See Ballinger*, 110 Ariz. at 425, 520 P.2d at 297.

Trial *In Absentia*

¶9 Gamez posted bond in May 1992 and was released from custody pending trial. At a pretrial conference in June, he was informed of his right to be present at the September 9 trial and told the trial would proceed in his absence if he failed to appear. Gamez did not appear at scheduled conferences and hearings on September 4, 11, 18, 23, 25, and 29; October 16, 23, and 30; and November 6, 19, and 25. On November 25, the court issued a bench warrant for his arrest and continued the trial to December 3. Gamez did not appear on December 3 and the trial was conducted in his absence. On appeal, he claims the trial court erred in proceeding *in absentia*, contending he did not have actual knowledge of the trial date and did not voluntarily waive his right to be present at trial. We review a trial court's decision to conduct a trial *in absentia* for an abuse of discretion. *State v. Holm*, 195 Ariz. 42, ¶ 2, 985 P.2d 527, 528 (App. 1998).

¶10 Criminal defendants have the right "to be present at every stage of the trial." Ariz. R. Crim. P. 19.2, 17 A.R.S.; *see also State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998). If a defendant fails to appear at trial, a court may infer he or she has voluntarily waived the right to be present if the defendant had personal knowledge of the time of the proceeding, the right to be present, and a warning that the proceeding would take place in his or her absence if the defendant failed to appear. Ariz. R. Crim. P. 9.1, 16A A.R.S.; *see also State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996).

¶11 It is uncontested that Gamez had personal knowledge of his right to be present at trial and a warning that the trial would proceed in his absence if he failed to appear. It is also uncontested that he did *not* have personal knowledge of the actual trial date.[2] But, contrary to Gamez's assertion, this does not necessarily render his absence involuntary; "it is possible for a defendant to voluntarily absent himself from trial even without actual notice of the continued trial date, under circumstances that indicate he would not appear even if he had known the new trial date." *State, ex rel. Romley v. Superior Court*, 183 Ariz. 139, 144, 901 P.2d 1169, 1174 (App. 1995).

¶12 In *Romley*, Division One of this court permitted the trial of a defendant who had escaped from prison to proceed *in absentia* although he did not have actual knowledge of the trial date. *Id*. at 145, 901 P.2d at 1175. The court found his absence voluntary because there was "no evidence to support an inference that he might have returned" even if he had known the trial date. *Id*. Similarly, in *State v. Cook*, 115 Ariz. 146, 149, 564 P.2d 97, 100 (App. 1977), *supplemented*, 118 Ariz. 154, 575 P.2d 353 (App. 1978), *overruled in part on other grounds by State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983), the court stated:

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[2]Although the state does not dispute that Gamez did not have personal knowledge of the trial date, it asserts that Gamez "forfeited" this claim by failing to raise it "upon his recapture and sentencing." The state, however, fails to cite any specific authority for that argument and the record shows the issue was properly raised in the trial court by Gamez's attorney when Gamez failed to appear for trial.

> We are not persuaded [Rule 9.1] requires actual notice of the time of a proceeding as a prerequisite to inferring an accused's absence is voluntary. The pivotal question is whether the defendant waived his right to be present by his voluntary absence and Rule 9.1 merely suggests one combination of factors which may support an inference of voluntariness. Thus, an accused who does not know of and fails to appear at a proceeding against him may be found to have waived his right to be present there if the record indicates criminal proceedings commenced in his presence, that he absconded knowing of his right to attend future proceedings, and that his disappearance has made it impossible to contact him with reference to these proceedings.[3]

The court further noted that a "defendant released on bail or his own recognizance has a concomitant obligation to be present [at scheduled proceedings] so as not to frustrate the progress of his prosecution." *Id.; see also Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354 (failure to maintain contact with counsel a factor in determining voluntariness of absence).

¶13 In this case, Gamez knew of his right to be present at court proceedings and failed to appear at twelve consecutive scheduled conferences and hearings, which eventually

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[3]In *Cook*, the defendant's trial date was continued on the day before trial was scheduled to begin. 115 Ariz. at 148, 564 P.2d at 99. Cook's attorney subsequently told the trial court he had been unable to locate Cook to inform him of the new date, and the trial was again continued for a month. *Id*. On the next trial date, Cook's attorney again informed the court he had been unable to locate Cook; the court refused to issue an arrest warrant and grant another continuance and conducted the trial *in absentia*. *Id*. After the case was remanded to the trial court for a ruling on whether Cook's absence had been voluntary, Division One of this court, in a supplemental opinion, found the facts sufficient to support the trial court's finding that Cook had voluntarily absented himself from trial. 118 Ariz. at 155, 575 P.2d at 354.

led to issuance of a bench warrant for his arrest. His sole appearance was at the initial status conference held in June 1992. Prior to trial, the court found Gamez had been told of his responsibility to maintain contact with his attorney and had failed to do so, and Gamez's attorney stated she had been unable to inform him of the new trial date because she had "los[t] contact with [Gamez], I believe, a couple of weeks ago." Further, Gamez failed to contact the court or present himself for thirteen years. We find no error in the trial court's having proceeded with trial in Gamez's absence. Gamez's failure to attend court proceedings and maintain contact with his attorney made it impossible to inform him of the trial date, and the circumstances indicate Gamez would not have appeared at trial even had he known the date. *See Romley*, 183 Ariz. at 144, 901 P.2d at 1174; *Cook*, 115 Ariz. at 149, 564 P.2d at 100.

Admission of Photographs

¶14 During trial, the court admitted photographs of the marijuana found in Apartment 301 into evidence over the objection of Gamez's attorney, who stated, "I don't think that there's been any link to Mr. Gamez saying he ever had any possession of any—or any link at all to the marijuana in the apartment. And I would object to any . . . photographs of it." On appeal, Gamez contends the trial court erred in admitting the photographs, claiming "the jury was unfairly prejudiced into believing [he was] responsible for that marijuana as well as the 19 pounds in his possession."

¶15 Trial courts have discretion to determine whether photographs are substantially more probative than prejudicial, and absent an abuse of that discretion, decisions to admit photographs into evidence will not be overturned on appeal. *State v. Salazar*, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992); Ariz. R. Evid. 403, 17A A.R.S. Moreover, we will not overturn a trial court's decision despite an abuse of discretion if we conclude the error is harmless beyond a reasonable doubt. *State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003).

¶16 There was unrefuted evidence connecting Gamez to the marijuana in the apartment and showing that he was involved in its sale. And, as the state points out, before the photographs were admitted, detailed testimony about the marijuana in the apartment had already been presented without objection.[4] In any event, however, there was overwhelming evidence that Gamez had been involved in a sale of at least nineteen pounds of marijuana, eleven pounds more than was required for his conviction under the version of A.R.S. § 13-3405 in effect at the time. *See* 1990 Ariz. Sess. Laws, ch. 366, § 8. That uncontradicted evidence supports his conviction for possession of marijuana for sale, and we can say beyond a reasonable doubt that the photographs had no effect on the jury's verdict. *See Beasley*, 206 Ariz. 334, ¶ 27, 70 P.3d at 459. Thus, admission of the photographs, even if unnecessary and prejudicial to Gamez, was harmless error and would not warrant reversal of his conviction.

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[4]As a result of Gamez's failure to object to the testimony about the marijuana in the apartment, the state argues he has "forfeited" this claim on appeal. But we find his objection to admission of the photographs sufficient, if only marginally, to preserve the issue.

See State v. Walker, 181 Ariz. 475, 482, 891 P.2d 942, 949 (App. 1995) (error in admitting evidence over defendant's objection will not justify reversal of conviction if substantial evidence supports verdict and it can be said beyond reasonable doubt that error did not contribute to verdict).

Disposition

¶17 Gamez's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge